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Dona G. Bradshaw

FEDERAL COMMUNICATIONS COMMISSION

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In Re Applications of:)	WT Docket No.:	96-41	
)			
LIBERTY CABLE CO., INC.,)	File Nos.:		
for Private Operational)	70877		WNTT370
Fixed Microwave Service	)	708778, 713296		WNTM210
Authorization and	)	708779		WNTM385
Modifications	)	708780		WNTT555
	)	708781, 709426, 711937		WNTM212
New York, New York	)	709332		(New)
)	712203		WNTW782
)	712218		WNTY584
)	712219		WNTY605
)	713295		WNTX889
)	713300		(New)
)	717325		(New)

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Date: May 29, 1997

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Thursday,
May 29, 1997

Federal Communications
Commission
2000 L Street, N.W.
Suite 201, Room 2
Washington, DC 20554

The parties met, pursuant to the notice of the
Administrative Law Judge, at 9:35 a.m.

BEFORE: HON. RICHARD L. SIPPEL
Administrative Law Judge

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2152

C O N T E N T S

<u>WITNESSES:</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>	<u>VOIR DIRE</u>
<u>For Liberty Cable:</u>					
Peter O. Price	2163	2179	2202	2204	
Behrooz Nourain	2209 2246	2305			

E X H I B I T SPLAINTIFF'S
EXHIBITS:

	<u>IDENTIFIED</u>	<u>RECEIVED</u>	<u>DESCRIPTION</u>
65	2179	2179	2/24/95 Memo
66	2283	2284	6/15/93 Letter
52	2337	2337	Howard Barr Deposition Transcript
54	2338	2338	Behrooz Nourain Deposition Transcript of May 19, 1997

Hearing Began: 9:35 a.m.
Recess Began: 12:15 p.m.

Hearing Ended: 4:12 p.m.
Recess Ended: 1:22 p.m.

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P R O C E E D I N G S

9:35 a.m.

JUDGE SIPPEL: We're on the record. We have Mr. Price as a witness today. Mr. Price is in the courtroom. I was going to just remind Ms. Kiddoo -- I failed to do that yesterday -- but we do have a witness from Room 215 in the event Mr. Nourain does arrive and is looking for a comfortable place to stay.

MR. BECKNER: Your Honor, I think one of us mentioned that fact yesterday, you know, in an off the record conversation. So I think she is aware of that.

JUDGE SIPPEL: Okay.

MR. BECKNER: She'll be right back.

JUDGE SIPPEL: That will be fine. It's Room 215, which is just two or three doors down behind me here.

MR. WEBER: Mr. Nourain has been in the witness room a number of times anyway, so I would hope he would remember that.

JUDGE SIPPEL: He probably knows it better than I do.

(Laughter)

JUDGE SIPPEL: Okay. Thanks, Mr. Weber. Are there any other appearances this morning?

MR. BECKNER: Your Honor, I just want to recognize Lori Zallops, sitting to my extreme right, a summer

1 associate working in our office, sitting here next to Debra
2 McGuire. She's not going to be participating, but she's
3 here and so I'll identify her to you and everyone else.

4 JUDGE SIPPEL: That's an early one. May summer
5 associate. That's okay.

6 MR. WEBER: School seems to begin early and start
7 early, so there are more law students here in May.

8 JUDGE SIPPEL: Yes, but it costs a lot more.
9 You're welcome to be here, Ms. Zallops.

10 MR. BECKNER: Thank you, Your Honor.

11 MR. SPITZER: Your Honor, I just see also sitting
12 right behind the Bureau is Paul Moon, one of our summer
13 interns.

14 JUDGE SIPPEL: Mr. Moon.

15 MR. MOON: Yes sir.

16 JUDGE SIPPEL: I remember you from yesterday.

17 MR. PETTIT: And Your Honor, from Wiley Rein,
18 Vipul Nishawala, another summer intern. We know he actually
19 finished law school.

20 MR. NISHAWALA: At least it feels that way.

21 JUDGE SIPPEL: Congratulations, congratulations.

22 Is he sitting for the bar or is that --

23 MR. PETTIT: No, no. Not yet.

24 JUDGE SIPPEL: Well, you've got all the easy stuff
25 behind you now. All right, well let's see. You're all

1 welcome. I just want to briefly return -- I'm sorry -- I
2 apologize to Mr. Price, but I do want to get some
3 clarification for my own purposes on the record, and then
4 we'll move right into the testimony.

5 Yesterday, I made a ruling with respect to your
6 Exhibit, to TW Exhibit 64, and the ruling was made in
7 perhaps a rather cursory fashion, in the interest of time,
8 and I want to just return to it, to just be sure that the
9 parties and the record is clear, that I consider that
10 evidence to be relevant and it's a very significant
11 bankrolling that perhaps requires a little more elaboration.

12 First of all, with respect to my authority to deal
13 with that evidence, under Rule 403 I have the -- I'm talking
14 about the Federal Rules of Evidence now, but I do have the
15 discretion to exclude evidence, even though it is relevant,
16 if it's going to involve -- well, the specific consideration
17 from my ruling is undue delay.

18 It could conceivably also get into some confusion
19 in terms of how the evidence was dealt with vis-a-vis some
20 of the witness, but at least at this stage of my end, of my
21 knowledge and involvement in the evidence, I would deem it
22 to be an undue delay in light of the time of this hearing,
23 in light of all the circumstances of the time that has been
24 taken to get this record made and if everything else goes
25 well, closed, I'm presented with a time problem.

1 In addition to that, it's submitted under Federal
2 Rule 1006, which really directs -- concerns itself with
3 summaries, summaries of voluminous writings, recordings or
4 photographs, and in a broad sense, it might be writings, but
5 we're really not talking about writings. We're talking
6 about events, and to put that in the form of a summary,
7 unless it were stipulated to, I don't believe it complies
8 with what Rule 1006 contemplates.

9 However, before I leave this subject, I do want to
10 note that -- and I'm going to ask counsel to comment on this
11 very briefly if you think that I'm somehow or other
12 mischaracterizing the evidence. Looking at how this is
13 presented, I'm seeing that Time Warner is relying upon
14 information that are in two exhibits that have been received
15 into evidence; that is, TW/CV 14 and 15. And they're tying
16 that information in which would be a matter of public
17 record.

18 Now I can be asked -- if it's not in the record, I
19 can be asked, of course, to take official notice of certain
20 filings with the Commission.

21 There still may be another avenue for considering
22 this evidence, but not in the context of hearing evidence,
23 and that would be with respect to proposed findings. If you
24 want to argue this to me in a proposed finding, I would be
25 certainly expecting to see composition and appropriate

1 comment to it from Liberty. But I would be able to consider
2 it in that light.

3 But it would not be testified to, and that would
4 certainly affect the weight of that evidence. It would
5 considerably affect the weight of the evidence.

6 If I were going to get into this, this subject,
7 since it does concern frame of mind and what I would say the
8 state or condition of the company in connection with these
9 activities, to make it really significant, highly
10 significant evidence in those contexts, it would be
11 requiring the opportunity to cross-examine, the opportunity
12 for explanation.

13 However, the ultimate facts do speak for
14 themselves, and to that extent, to the extent that it meets
15 the rules of evidence, you know, I would permit it to be
16 considered in the context of proposed findings. That's
17 basically all I have to say.

18 My ruling is as it was. I'm not revisiting the
19 ruling. The Motion to Receive it into evidence is denied.

20 MR. SPITZER: May I just respond briefly on two
21 very small points, Your Honor.

22 JUDGE SIPPEL: Sure.

23 MR. SPITZER: And I think the timing of this issue
24 was critical and again, I don't want to reopen this issue.
25 You've made a ruling, and we appreciate that.

1 JUDGE SIPPEL: Yes. You've got a win on this one.

2 MR. SPITZER: The evidence that they draw upon,
3 the facts they draw upon were before them a year ago,
4 approximately, to comment on this issue. Time Warner has
5 had this information for many, many months.

6 Secondly, in terms of the reliability of this
7 chart as presented to us, Exhibits 14 and 15 are the basis
8 for the column labeled "Install Date," but the column dated
9 "Application Filing Date," frankly we don't know which
10 applications they're referring to, and as we saw yesterday
11 when we were -- during the examination of Jennifer Richter
12 and her inventory, there were modifications, there were
13 amendments, there are a multitude of applications relating
14 to different paths.

15 And it would take some doing, it would take some
16 testimony, some checking, to determine whether in fact these
17 application dates are the right dates. And we haven't even
18 begun that process obviously, and so it would -- actually it
19 would require significant examination to determine the
20 validity of this in terms of the facts that are allegedly
21 presented here.

22 JUDGE SIPPEL: All right. I will accept that as
23 Liberty's position with respect to that leg of the ruling,
24 which is the undue delay at this stage of the proceeding and
25 what it would involve in terms of the necessity for me to

1 hear argument and testimony on what could be complicated
2 issues.

3 Do you have anything you want to say about this,
4 anything more, Mr. Beckner?

5 MR. BECKNER: Well, I didn't until Mr. Spitzer
6 talked.

7 JUDGE SIPPEL: Well, that's why I asked you.

8 MR. BECKNER: I just want to respond to a couple
9 of points. I have here with me a copy of a notebook, which
10 was delivered with the exhibits to the Wiley Rein firm on
11 Tuesday.

12 JUDGE SIPPEL: Let's give a date, since we're on
13 the record here.

14 MR. BECKNER: On the 27th.

15 JUDGE SIPPEL: 27th of this month.

16 MR. BECKNER: Of this month.

17 JUDGE SIPPEL: Of this year.

18 MR. BECKNER: And the notebook -- and I'll be glad
19 to tender it to you if you want to satisfy yourself that I'm
20 characterizing it accurately -- has in it the application,
21 which has a date of the 27th of May. I would also just
22 point out that the reason for the time at which we submitted
23 this document to Liberty is that their position, most
24 recently in the arguments about discovery preceding this
25 hearing, which you heard, is that they weren't in given to

1 us in response to document requests, because they were
2 public record documents. Their position is you can go get
3 them yourself and see.

4 And there's nothing unreasonable about that. I'm
5 not suggesting that there is. As a practical matter,
6 getting these documents from the FCC or from the Commercial
7 Service that we used to get them, is not always speedy, and
8 sorting through the files is not something that you can
9 accomplish quickly.

10 So even though we had this thing sitting around
11 for two weeks and we just chose not to hand it over, we were
12 making inquiries up through Friday to make sure that we had
13 the right applications, which specifically identified on
14 them, as adding a path with the paths that are listed on the
15 proposed exhibit.

16 So I just wanted to respond to possible suggestion
17 that we were trying to sandbag in handing this thing over at
18 the last minute. Well, that's all I want to say. I'm not
19 trying to get Your Honor to modify his ruling, but I just
20 wanted to respond to what you said.

21 MR. SPITZER: If Mr. Beckner's really saying that
22 it took them two years to get these public documents,
23 because I think it's been about two years since we first
24 produced documents to them --

25 MR. BECKNER: Yes, it's been two years.

1 MR. SPITZER: It's been two years since this one
2 of the HPO filings. It has been at least a year.

3 MR. WEBER: No, '96.

4 MR. SPITZER: It has been over a year to acquire
5 these public record documents. I may call Mr. Beckner as a
6 witness because that may be relevant of why it may be some
7 time that we didn't know what was filed and what wasn't,
8 because Time Warner couldn't get public record documents for
9 a year. But I'll let it rest at that.

10 JUDGE SIPPEL: Well, I thought that this was going
11 to be a quick one. Well, I do have to respond because I
12 am -- obviously, this is a bench ruling that is not just a
13 routine bench ruling in my mind, but what you're telling me
14 is exactly the reason that I am denying your motion. If
15 this was going to be this kind of a problem and you had this
16 kind of evidence in mind to be presented in this fashion
17 under the Federal Rules, we could have had a prehearing
18 conference at least a month ago, and/or we could have
19 considered this in the first session.

20 I don't think that you've made any case out at all
21 in terms of the equities on your side. Now I'm not
22 suggesting that you're trying to sandbag anybody; it's not
23 that at all. It's just that what you come in with is too
24 much too late for this hearing to handle it. But because it
25 is relevant evidence, at least I'm deeming it to be

1 relevant, I want to be sure that this ruling is the right
2 ruling and it's going to stand up, and I'm convinced that it
3 will. But I want to get it clear on the record before I
4 just cut it off.

5 Mr. Price, one more question I have. Does the
6 Bureau have anything to add to this?

7 MR. WEBER: No, Your Honor. I think we're
8 confident that you've made the proper rulings and we're
9 willing to proceed.

10 JUDGE SIPPEL: Okay, then that's it. Mr. Price,
11 will you come forward please sir?

12 Whereupon,

13 PETER O. PRICE

14 having been duly sworn, was called as a witness
15 herein, and was examined and testified as follows:

16 JUDGE SIPPEL: Please be seated. I remind you
17 that there's a top on that water canister. Remove it before
18 you pour. Your witness, Mr. Beckner.

19 DIRECT EXAMINATION

20 BY MR. BECKNER:

21 Q Thank you, Your Honor. Good morning, Mr. Price.

22 A Good morning, Mr. Beckner.

23 Q Mr. Price, before we get on a matter I'm just
24 going to indicate to you that the time frame that I'm going
25 to be asking you about is the spring of 1993. I'm telling

1 you that now, so I don't have to repeat that in every
2 question that I ask you.

3 A Yes sir.

4 Q So we can save some time. In the spring of
5 1993 --

6 MR. SPITZER: Your Honor, I hate to be this way,
7 but just in the interest of clarity, you literally mean
8 March 20 to June 20 of '93 or do you mean --

9 MR. BECKNER: No.

10 MR. SPITZER: Well, you're defining the period. I
11 just want to know what we're talking about.

12 JUDGE SIPPEL: I'll sustain that objection.
13 Please be very definitive with these days, months and years.
14 We have a record that we have to go back to months from now.

15 BY MR. BECKNER:

16 Q In the first six months of 1993, what kind of
17 supervisory and responsibility did you have with respect to
18 Mr. Behrooz Nourain?

19 A I don't recall I had any supervisory
20 responsibility over Behrooz Nourain.

21 Q Was there a person who was responsible for
22 supervising Mr. Nourain during the period I discussed?

23 A I believe there were two people. One was Tony
24 Ontiveros and one was Bruce McKinnon. How they shared that
25 responsibility I'm not sure, but Bruce was the head of

1 Operations and Tony was the general manager of Operations,
2 and Behrooz resided in that Operations Department.

3 Q Now you recall that Mr. McKinnon left the employ
4 of Liberty, I believe it was in the middle of May 1993?

5 A Yes sir.

6 Q Okay. Did you some advance notice of
7 Mr. McKinnon's departure?

8 A I can't recall exactly, but I believe it might
9 have been a week or two. Not substantial notice but
10 reasonable notice.

11 Q Once you received notice of the fact that
12 Mr. McKinnon was going to leave the employment of the
13 company, did you do anything yourself about assuming any
14 kind of responsibilities that he might have had?

15 A I can't recall that I did. I recall meeting with
16 Tony Ontiveros and explaining to him that he would assume
17 the operations responsibilities as the general manager of
18 Operations.

19 Q But at that moment at least, you yourself really
20 didn't plan to step into Mr. McKinnon's shoes with respect
21 to supervising Behrooz Nourain; is that --

22 A No, I did not.

23 Q Okay. Were you aware of the fact in the first six
24 months of 1993 that Mr. Nourain was activating a new
25 microwave path to serve Liberty customers?

1 A Yes, I believe -- whether he was activating them,
2 it was -- I was aware we were activating paths as a company.
3 We were lighting up new buildings. He was the one
4 responsible for that. I presumed that he would have been
5 the one doing it.

6 Q He being?

7 A Behrooz Nourain, but since I wasn't directly
8 involved in the Operations Department, whether it was
9 Behrooz or whether it was Tony or whether it was Bruce
10 working with counsel on a particular application, I don't
11 know. But it was Behrooz's responsibility overall.

12 Q Did you get any kind of regular reports like the
13 weekly operations reports that we've discussed previously
14 during this first six months of '93?

15 A Well, we received the weekly operations reports
16 once a week continuously, as I recall, from 1991 on.

17 Q Okay. And those reports generally told you what
18 was going on in terms of installation of new customers and
19 so on; is that right?

20 A Yes. I believe they were called installation
21 reports. I can't remember exactly the title, but they
22 described the buildings that were pending and the buildings
23 that had been installed.

24 Q I'd like you to take a look at an exhibit that's
25 been previously marked and admitted. It's called TW/CV

1 Exhibit 51. I believe, Your Honor, is that in the small --

2 JUDGE SIPPEL: No. This is in the larger notebook
3 that I have, and I'm going to give that to Mr. Price right
4 now. That's the Richter letter, right?

5 MR. BECKNER: Yes.

6 THE WITNESS: Thank you.

7 JUDGE SIPPEL: You bet.

8 BY MR. BECKNER:

9 Q Mr. Price, I'll just tell you that Exhibit 51
10 actually consists of two non-identical copies of what
11 appears to be the Richter letter. If you want, you can read
12 the second copy, which doesn't have the left margin on it at
13 all.

14 (Witness reviewing document.)

15 A Yes, I've read it.

16 Q All right. Mr. Price, do you recall having seen
17 this letter or a copy of it some time in late April or early
18 May of 1993?

19 A I don't remember it specifically, but I gather
20 from, you know, recent events and prior testimony that it
21 probably crossed my desk.

22 Q Okay. I'd like you to just for a moment take a
23 look at the first copy of the letter, the one that does have
24 the margin somewhat chopped off. It's a handwritten note.
25 It says "Peter, read this please. Review and advise. B.M."

1 And there's a date, looks like maybe it's 4/28 or 4/29/93.
2 Does that refresh your recollection at all as to whether or
3 not you received or looked at a copy of this letter at the
4 end of April of 1993?

5 A Well, judging from the note, I presume it was an
6 interoffice transmission from Behrooz to me and I presume I
7 would have seen it, yes.

8 Q Okay. Do you recall discussing the letter or any
9 of the contents of the letter with Mr. Nourain during this,
10 what I'm going to say, late April-early May 1993 period?

11 A No, I do not recall.

12 Q Okay. When you read the letter now, there's no
13 topic that the letter discusses that refreshes your
14 recollection that you might have discussed that topic with
15 Mr. Nourain?

16 A No, not at all.

17 Q During the time surrounding the date of this
18 letter, was it common or uncommon for Mr. Nourain to route
19 copies of correspondence to you?

20 A Uncommon.

21 Q Okay. Did Mr. Nourain sometimes route
22 correspondence or other documents to you with the letters
23 "FYI"?

24 A No. I rarely got documents from Behrooz. He
25 wasn't working for me and perhaps he sent me this document

1 because Bruce was phrasing out and he would normally have
2 sent it to Bruce. But I can't tell why he would have sent
3 it to me.

4 Q The question was, if you remember, the occasions
5 when Mr. Nourain did refer a document to you, did he put up
6 in the corner something like "Peter or Mr. Price, FYI," for
7 your information?

8 A I can't recall. I didn't get that many documents
9 from Behrooz and I can't recall when I did what specifically
10 they were. I wasn't in that loop normally.

11 Q Okay. Now one of the things that the letter
12 discusses is STAs, and I think we established from your
13 earlier testimony that you knew what STAs meant; that's the
14 Special Temporary Operating Authority.

15 A Yes sir.

16 Q Do you remember whether or not at the time, at or
17 around the time of this letter, you were personally involved
18 in discussions about getting STAs or the need to have STAs,
19 anything like that?

20 A No, not around this time. It would have been
21 earlier I was directly involved in discussions about STAs
22 when I asked for the procurement of the STAs, at I believe
23 was the end of '91.

24 Q Okay, so we're talking about -- you're talking now
25 about a period more than a year earlier than the date of

1 this letter?

2 A That's correct.

3 Q Okay. I'd like you to take the other notebook
4 that's there in front of you, the one that's closed, and I
5 will tell you that there are some documents in there behind
6 the tabs. I'd like you to turn to Tab 10, which for the
7 record has been marked and admitted as TW/CV Exhibit 61. Do
8 you have that in front of you sir?

9 A Yes, I do.

10 Q Okay, and you see this is a copy of a Pepper and
11 Corazzini bill. If you turn to the second page of the bill,
12 there is a time entry that says "4/28/93, JLR, Phone call:
13 Peter Price, re: STA."

14 A Yes, I see it.

15 Q Do you see that sir?

16 A Yes sir.

17 Q Okay. Does that refresh your recollection at all
18 about whether or not you were involved in discussing the
19 subject of STAs at the end of April 1993?

20 A Yes. It probably I presume was in connection with
21 this letter, which directed my attention to the filing of
22 STAs.

23 Q Okay.

24 A The letter you showed me earlier of April 20, '93.

25 Q Okay. Do you remember whether or not at or about

1 the time of the letter, the company was concerned about
2 delays in FCC processing of its license applications?

3 A We were continuously concerned with the delays of
4 getting our licenses. That's why we were applying for STAs
5 and had started to a couple of years before.

6 Q Okay. Do you remember whether or not your level
7 of concern at the end of April '93 was any higher than at
8 other times?

9 A Well, I can conclude from reading the letter you
10 just showed me of April 23 that counsel was concerned that
11 there was a timeliness question and we should be filing for
12 STAs, so I think counsel's letter highlighted a problem,
13 that STAs should be filed on a more timely basis, and I
14 believe we took action to do that.

15 Q Okay. I'd like you to turn to Tab 11 in the same
16 notebook you've been looking at, and that's for the record
17 been marked and admitted at TW/CV Exhibit 62. It's a copy
18 of letter to you dated May 25, 1993. It's a redacted copy.
19 Do you recall receiving this letter from Ms. Richter?

20 A Not specifically, but I'm sure if it was directed
21 to me, I did receive it.

22 Q Okay. The first sentence of the letter says "As I
23 am sure you're aware, the Commission promptly granted all of
24 the STA requests we filed on Liberty's behalf." As you sit
25 here now, can you remember whether or not you were aware of

1 the fact that the Commission had granted Liberty's STA
2 requests before you received this letter?

3 A No, I can't recall. We made large numbers of
4 those requests continuously over a period of time, and I
5 wasn't aware precisely when they were acted upon.
6 Generally, operations would deal with counsel on that.

7 Q Okay. And I take it from your answer then that at
8 or about the time of this letter that we're looking at, it
9 was not the practice of Mr. Nourain or someone else to send
10 you a note or give you a phone call to tell you we got STAs
11 for such and such a path?

12 A No, it was not.

13 Q The letter, the bottom line before the redaction
14 begins on the first page, Ms. Richter writes "If there's
15 some alternative course of action you need me to follow,
16 please notify me at your earliest convenience." Did you
17 notify her of any alternative course of action other than
18 the one that she said she was going to follow in this
19 letter?

20 A Not that I recall, no.

21 Q All right. I want you to go back, if you will,
22 and take a look at Exhibit 51, which is the April 20th
23 letter in the other book. If you just take a look at the
24 first paragraph of the letter, as you read the first
25 paragraph today, does it suggest to you that there might be